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FILED
JUN 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION, *et al.*,
Appellants,

v.

BRESWICK & CO., *et al.*, as Common Stockholders of Alleghany Corporation, etc.,
Appellees.

No. 82

BAKER, WEEKS & CO., *et al.*,
Appellants,

v.

BRESWICK & CO., *et al.*,
Appellees.

MOTION TO RETAX COSTS

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Breswick & Co.
and Myron Neisloss.

RANDOLPH PHILLIPS,
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Appellee Pro Se.

June 12, 1957.

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MOTION TO RETAX COSTS

Appellees Breswick & Co., Myron Neisloss and Randolph Phillips move for an order retaxing costs as taxed by the Clerk in the sum of $4,400 in No. 36 and in the sum of $150 in No. 82, by relieving appellees of the payment thereof.

This motion is made pursuant to that part of Rule 57 of the Rules of this Court providing that costs shall

be allowed to appellants in cases of reversal of any judgment "unless otherwise ordered by the Court." The grounds of this motion are as follows:

1. Taxation of costs at this time against appellees is premature in view of the decision of this Court remanding this case to the District Court.

2. Taxation of costs against appellees would be inequitable and inappropriate.

A.

Taxation of costs at this time is premature.

Appellees complaint, as amended by their supplemental complaint herein, was for a final judgment setting aside the jurisdiction of the ICC and its orders with respect to the new issue of preferred stock of Alleghany Corporation. Appellees sought a permanent injunction against this issue upon two grounds: (1) That the ICC had no jurisdiction; and (2) that if the ICC had jurisdiction, its orders approving the issuance violated Section 20a of the Interstate Commerce Act. This Court reversed the final judgment of the District Court insofar as it was based on (1), and did not reach the issues raised by (2). It may well be that the District Court, upon the remand, will sustain appellees' complaint that the orders violated the Interstate Commerce Act and, therefore, that appellees will ultimately prevail herein.

The clerk has taxed printing costs in the amount of $4590. A substantial portion of these costs relates to the printing of documents bearing on the issue which this Court did not reach, namely, the validity of the preferred stock orders of May 26, 1955 and June 22, 1955 made by ICC's Division 4. They include the report of the ICC on the issue, the application of Alleghany, the proxy material, Exchange Offer, and other documentary

evidence such as exhibits before the ICC and pleadings in the District Court. None of this was relevant to the issue decided by this Court. In addition, a large part of the record derives from Alleghany's partial distribution of the preferred stock while appellees' application for a preliminary injunction was *sub judice* and after Alleghany had notice thereof.

It is normal practice not to tax costs until the disposition of an entire case and in the present posture of this case it is respectfully suggested that it is premature to tax costs at this time.

B.

Taxation of costs against appellees would be inequitable and inappropriate.

This action was instituted on June 6, 1955 after the ICC by Division 4, refused to permit appellees to be heard in a proceeding involving a reorganization of Alleghany's capital structure, including issuance of 45 million dollars in new preferred stock of Alleghany Corporation which the ICC held and which the District Court subsequently found would dilute the value of the common stock. Appellees owned only 1700 common shares in the aggregate and in effect, if not in form, sought intervention before the ICC in a representative capacity. The District Court permitted appellees to amend their complaint to recite its representative nature. All of the justices of this court, both majority and minority, agree that the threatened dilution gave appellees standing to sue.

Throughout the proceedings, both before the ICC and in the District Court, appellees urged that the Exchange Offer pursuant to which the preferred stock was to be issued, was grossly unfair to the holders of the common stock in that, at the expense of the company it rewarded

the holders of the preferred with a $15,000,000 premium in *excess* of the maximum legal claim of the holders of the preferred in violation of the equitable equivalent rule laid down by this court in *Schwabacher* v. *U. S.*, 334 U. S. 182, and in disregard of all applicable legal standards. The SEC, in a proceeding instituted by Alleghany to exempt the preferred stock from the application of the Investment Company Act, held that the Exchange Offer would produce a "grossly unfair result" to the common stockholders. This finding was based upon the testimony of Alleghany's own experts tendered in support of its application. It may well be that the District Court or the ICC which has held no evidentiary hearing and did not have the SEC evidence in its record will, upon a remand, make a similar finding.

This Court's majority opinion determining that the ICC has exclusive jurisdiction over Alleghany did not reach the question of the plan's unfairness which the District Court did not determine although asked to do so by all parties. In fact this Court remanded the proceeding to the District Court for a determination of that very question. In view of the holding of the SEC on the unfairness issue (as distinguished from specific Investment Company Act prohibitions) that the plan *was* unfair to the common stockholders, there is at the very least, a likelihood that the District Court or the ICC on remand, will, in the public interest and in consequence of the evidence and admissions before the SEC and the rule laid down in *Schwabacher*, reach a similar result.

We suggest that in view of the public interest aspects of this case referred to in the majority opinion and the substantiality of appellees' position which had the support of three justices of this court and with which the Solicitor General identified, it would be inappropriate to have small stockholders such as appellees, whose stock has a market value of only $16,000, bear the full brunt

of litigating these important questions against a corporation such as Alleghany with its more than $100,000,000 of assets.

WHEREFORE appellees pray for an order of this court granting their motion to re-tax costs, and upon such re-taxation, relieving appellees of payment of costs.

Respectfully submitted,

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